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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 495.

PATRICK H. BODKIN,
Appellant and Petitioner,
v.
WILLIAM B. EDWARDS,

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

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*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, the appellant in No. 495, Bodkin vs. Edwards, an appeal from the Circuit Court of Appeals for the Ninth Circuit, hereby respectfully, earnestly and sincerely prays that this Honorable

Court will again examine the record in said case and reconsider the matter of a final decision therein.

THE "LAW OF THE CASE" DOCTRINE PREVENTED FREEDOM OF JUDGMENT BY THE DISTRICT COURT AS TO THE MATERIALITY OF ALLEGATIONS IN THE BILL OF COMPLAINT AND OF THE TESTIMONY TAKEN IN THE CAUSE.

Anyone truly familiar with this case may deduce the pith of the contents of this petition from the titles of the chapters thereof. (See Index.)

Five decisions were rendered below. Only two of them, however, were free and independent expressions of views on the law *and, consequently, also on the matter of materiality of allegations and testimony.* Those two free-minded utterances were the decision of District Judge Bledsoe, who held that the land department had accurately construed and enforced all pertinent law and, therefore, *that the allegations of the bill were utterly immaterial*, and the subsequent decision of Circuit Judge Morrow who, in reversing Judge Bledsoe, construed two public land statutes in a manner openly and emphatically at variance with fifteen years of practice and decision in the land department, condemned one set of administrative regulations as invalid, adjudged to be violative of law a rule of practice in said department as to contest proceedings against public land entries, *declared that the allegations of the bill were plainly material*, and, of course, thereby settled "the law of the case" in all the courts below.

The contents of the assignment of errors on the appeal were neither discussed generally in this court's opinion of February 28, 1921, nor was any specific error alleged therein even mentioned in said opinion. It is believed that had the very first of the errors assigned been considered fully in connection with the rulings made by Circuit Judge Morrow, with which rulings it must be presumed that the Court is familiar, as in its opinion it cites 249 Fed. 562, it would have been apprehended that among the questions *duly* presented here was the one whether Circuit Judge Morrow was altogether, or at all, correct in saying that the land department's findings of fact in the contest proceedings which is set out in the record of this case were *immaterial, because, in contemplation of law, there had been no contest proceeding and no entry canceled in such proceeding.*

Circuit Judge Morrow's view, although long and thoroughly known to the land department, have been rejected by that department (*Wells v. Fisher*, 47 L. D. 288), and will undoubtedly remain rejected by it until this Court, by a final announcement adhering to its opinion of February 28, 1921, shall clearly and unmistakably indicate that it approves and concurs in the views of the Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562. For at this time the belief seems prevalent that *this Court was not apprized when it announced its opinion of February 28, 1921, that there was dissent and disagreement between the District Court and the Court of Appeals on controlling matters of law, and that not in any juridical, nor logical, nor any acceptable sense, was there a concurrence between them in matters of fact which each court had adjudged material.*

The decision of this Court of February 28, 1921 was rendered on a motion to dismiss or affirm. Owing to considerations which are set out hereinafter, counsel for appellee was persuaded to believe that such motion should not be answered, and, therefore, no answer thereto was made.

No brief on the merits had been filed on behalf of either party at time of rendition of this Court's decision. It follows that said decision was rendered in the absence of any representations whatsoever to the Court on behalf of the appellant, who was forced into litigation which produced five decisions below, three in the District Court, one of which was on rehearing, and two in the Court of Appeals. All that litigation was started by a man who maintained his suit in *forma pauperis* and took advantage of every opportunity to increase the expenses of his adversary by injecting into the record in the courts below much obviously immaterial matter.

May we suggest that this Court possibly was not advised that while the appellant was seeking redress for grievous wrongs done him by the courts below, that he was also, in fact, defending in this Court the Department of the Interior of the United States and seeking vindication at the hands of this Court of that department's rather emphatic refusal to follow the views expressed by the Court of Appeals in 249 Fed. 562. See *Wells vs. Fisher*, 47 L. D. 288, wherein the Department of the Interior adheres to those construction of statutes and those administrative regulations which were condemned as violative of law and invalid in the opinion of the Court of Appeals in the instant case.

The said decision of this Court, as we very respect-

fully and confidently submit, is clearly shown in the discussion thereof hereinafter to have been based upon the misconception that the District Court and the Circuit Court of Appeals had CONCURRED in adjudging that certain of the allegations in the bill of complaint, as well as the scant amount of testimony that came from two witnesses in the District Court, were material and controlling in the litigation. It was due entirely to such misconception—a misconception which the badly arranged record in this case was likely to produce—that this Court held that “the case as presented here turns essentially on questions of fact” and, therefore, that it is classifiable among cases of the character which “under a settled rule” this Court will not review.

It would be offensive to make the observations which are set out in the next paragraph hereof, if we were not making them simply for purposes of elucidation of the propositions we are endeavoring to persuade this Court to accept and approve.

If this case were in this Court on an appeal from a Court of Appeals decision reversing a District Court because of alleged error with respect to the *materiality* of allegations in a bill of complaint, of course this Court would not say, as it said in its decision of February 28, 1921, “that both courts below on a review of the evidence have found the facts in the same way.” *But there is absolutely no essential difference between such hypothetical case and the instant case, as we will proceed to demonstrate.*

The District Court, in sustaining a motion to dismiss the bill of complaint (241 Fed. 931), held and ruled that none of the allegations of fact in the bill of complaint possessed the merit of materiality. *That ruling*

settled "the law of the case" in the District Court, of course.

When the case went to the Court of Appeals (249 Fed. 562), that court, after ruling (a) that the land department had misconstrued one act of Congress for over a generation, (b) that said department had "overlooked" or "misunderstood" another act of Congress for a period of ten years, and (c) that said department's long-established regulations and decisions were clearly violative of statute and destructive of the rights of citizens, declared that the District Court's views as to the materiality of allegations in the bill of complaint were wholly erroneous. Manifestly they were erroneous, if the District Court had failed utterly to perceive what the Court of Appeals asserted was true, viz., that the land department, for about fifteen years, had been despoiling American citizens through gross misconstructions of acts of Congress relating to the public lands.

The ruling of the Court of Appeals in reversal of the District Court not only *settled "the law of the case" for that court but for the Court of Appeals as well.* Hence it came about that the District Court was powerless—as in effect it said it was—to do aught else in and by its second decision (R. 78 to 83, 267 Fed. 1004) than to obey and effectuate the law as to materiality as it had been expounded and defined by the Court of Appeals. *It goes without saying that the District Court could not thereafter, as it had done theretofore, announce views on materiality with freedom of expressed thought and judgment.*

Now inasmuch as only those allegations of fact which the District Court had adjudged *immaterial* in its first decision (241 Fed. 931), were the identical alle-

gations of fact which were brought before it for a second decision in pursuance of the "law of the case as settled by the Court of Appeals, does it not follow that when the District Court in its second decision (R. 78 to 83, 267 Fed. 1004) declared these allegations of fact, and the proof offered in support thereof, sufficient in law to warrant a decree granting the prayers of the bill, it acted wholly under compulsion, patently against its own judgment as previously announced, in faithful obedience to "the law of the case" doctrine, and not at all in true concurrence with the Appellate Court, but, on the contrary, as a mere instrument to put into effect the directions of the Appellate Court?

If what we have said hereinbefore be true and be logical why, we ask, is it not a legal consequence thereof that No. 495 came into this court with the District Court and the Court of Appeals entertaining and expressing divergent and irreconcilable views on the materiality of questions of fact?

What could be more obviously the opposite of concurrence in matters of fact than that the District Court and the Court of Appeals differed and dissented from each other on the matter of materiality of the allegations in the bill of complaint?

The judgment of this Court was doubtless considerably, if not entirely, influenced by the statement in the second Court of Appeals decision, announced by District Judge Wolverton (R. 84 to 86, 265 Fed. 621) that "a careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated, including the supposition of this Court relative to use made of the soldiers' additional homestead scrip by Bodkin in securing his entry of the land in the Land Department."

The first Court of Appeals opinion (249 Fed. 562) was described and declared in the second opinion of the same court (R. 84 and 85, 265 Fed. 621), announced by District Judge Wolverton, as well as in the second opinion of the District Court, which was rendered by Judge Trippett (R. 78, 81, 267 Fed., 1004), *as having definitely and finally stated and settled the law in this particular case.* Obviously, therefore, we must turn to the first Court of Appeals opinion for an insight, *which it alone can afford*, as to what allegations in the bill of complaint were adjusted material in *the decision which settled the law in this particular case for the two courts below.*

Whether an allegation is material necessarily calls for a ruling in law. In Judge Bledsoe's opinion (241 Fed. 931), it was held by him, in sustaining the motion to dismiss the bill of complaint, that none of the allegations therein possessed materiality. Thereafter the Court of Appeals, differing from Judge Bledsoe, declared that many, if not all, of the said allegations were material. Therefore, when the case was again heard in the District Court, subsequent to rendition of the first decision by the Court of Appeals, Judge Trippett, who then presided in the District Court, was constrained by reason of the first Court of Appeals opinion to rule and hold as being material any allegation made in the bill of complaint, or any testimony pertinent under any such allegation, which should be deemed to possess materiality under the views which were expressed by the Appellate Court in 249 Fed. 562. As a matter of record fact Judge Trippett stated in his opinion (R. 81, 267 Fed. 1004) that "in any event the Court of Appeals has settled the law of this case." District Judge Wolverton, in announcing the

second opinion of the Appellate Court, expressly stated that he and it were constrained to rule and hold as to materiality in strict accordance with the views on materiality expressed in the first opinion of that court. Judge Wolverton expressed himself thus:

"It is a rule of law no longer to be controverted in the Federal Courts, that whatever has been decided upon one appeal cannot be re-examined in a subsequent appeal of the same suit or action."
(265 Fed., 621.)

From the foregoing it is unmistakably evident that after rendition of the *first* Court of Appeals decision, all judges below (whether in the District Court or the Appellate Court) were *bound* by "the law of the case" doctrine to rule as to materiality as was ruled in said *first* Appellate Court decision. *It is an inescapable deduction from these circumstances that it is impossible to say that two courts below CONCURRED that all material allegations of the complaint had been substantiated.* We submit, therefore, that in this Court, and on the appeal in this case, there should have been, and that the appellant was entitled to, an opinion as to whether the Court of Appeals did or did not in its first decision (249 Fed. 562), wrong the appellant in this Court by what said Circuit Court of Appeals conceived to be and adjudged to be "the law of the case."

While this Court observed that the record "does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included," it is respectfully submitted that the record does contain

every item of and all of the evidence in the courts below which either court deemed in anywise even pertinent under the allegations of the bill of complaint. *In other words, we are positive and certain that the record contains entirely all the evidence ever adduced in the proceeding which took on the character of materiality under those rulings in matters of law which were made in the first decision of the Court of Appeals fixing and settling "the law of the case."* Certain it is that if those rulings in matters of law are sound, there is plainly in the record all and everything essential to support the conclusions announced below. However, should this Court nevertheless desire that the entire record made in the Court of Appeals, upon the second decision therein, be printed and filed here, action will be taken accordingly on the slightest intimation to us of such desire.

MAY IT NOT BE SAID RESPECTFULLY THAT IF THIS COURT'S DECISION OF FEBRUARY 28, 1921, IS NOT UNDECISIVE AS TO "THE LAW OF THE CASE" IN THE COURTS BELOW, IT IS NECESSARILY A CONCURRENCE IN THE OPINION OF THE APPELLATE COURT THAT THE LAND DEPARTMENT HAS MISUNDERSTOOD THE ACT OF MAY 14, 1880, AND "OVERLOOKED" THE FIFTH SECTION OF THE ACT OF JUNE 27, 1906, IN ITS DUTY OF ADMINISTERING THE PUBLIC LANDS OF THE UNITED STATES.

Had this court stated specifically, or even described very generally and broadly, "the questions of fact" which it regarded as necessarily classifying this controversy among cases subject to a "settled rule" that

"concurrent findings" of fact below will not be reviewed in this Court, or had there been mentioned in the opinion this Court announced on February 28, 1921, only a single matter of fact which it believed had been determined below and which it further believed had been regarded by *both* courts below as controlling in the disposition of the case, or had there been said anything whatever by this Court which would indicate that it had accurately apprehended what the findings below were, or had this court said only this, viz, that the facts in proof, as found by the courts below, require, as a matter of law, a decree making the appellant here a trustee for appellee of the legal title that passed to the former under a patent issued to him by the land department, we would be very much less perplexed and embarrassed as to how we may best assist this court to perceive and concur in our contentions here, to wit:

1st. That every allegation of fact the Court of Appeals adjudged to be material took on "materiality" only through grossly erroneous constructions of two acts of Congress and through a display of unfamiliarity with the law, as frequently expounded by this Court, with respect to the scope of the discretion exercisable by the Land Department in giving effect to the salutary statute of May 14, 1880, which confers a preference *right* of entry on anyone who successfully contests and procures the cancellation of a homestead entry for any reason or upon any ground challenging observance of the law by the entryman thereunder.

2d. That it was *impossible* for "both courts below on a review of the evidence" to "have found the facts in

the same way," and that it was *impossible* for the District Court to have exercised freedom of judgment as to the facts—as to the *materiality* of the facts—when, *as the record shows and the District Court expressly said*, its views as to the facts—as to the *materiality* of the facts—were coerced by, were under compulsion from, the "law of the case" as stated in the first decision by the Court of Appeals (249 Fed. 562).

CASES NOW IN THIS COURT WHICH WERE IMMEDIATELY AFFECTED BY THE DECISION RENDERED FEBRUARY 28, 1921.

We regard it as reasonably certain that the court did not realize that an affirmance in No. 495 would be regarded by the legal profession and the public as at least a tacit or implied complete confirmation and approval of the rulings of the Court of Appeals in 249 Fed. 562. Whether such affirmance is such confirmation and approval must soon be determined by this court in Nos. 291 and 292, McLaren, administrator, v. Fleischer, and Culpepper v. Oeheltree, respectively, which are here on certiorari to the Supreme Court of the State of California, after decisions by that court on December 1, 1919, which are expressive of views perfectly the opposite of the views of the Court of Appeals in 249 Fed. 562.

The counsel for the appellee in No. 495 are also the counsel for the petitioners in Nos. 291 and 292. Notwithstanding this identity of counsel in the said three cases, the motion to dismiss or affirm in No. 495 contained not the slightest reference to Nos. 291 and 292. But in the petition for the writs in those two cases reliance was made, in the main, upon the stated ground—

"that the opinion of the highest court of the State of California in this cause, holding that the respondent could and did secure a preference right to the land in controversy, under the act of May 14, 1880 (21 Stat. 141), which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. Rep. 562, 568. The latter case involved land in the near vicinity of that here in controversy, and hence this Honorable Court should take action to bring about a uniformity of decisions." (pp. 2 and 4 of the petition for *certiorari* in No. 291.)

A motion to advance in Nos. 291 and 292, if made, might have been granted by this Court. Certainly if this Court had been informed in a motion to advance said cases that No. 495 was a case identical in all its legal aspects and, as is true, that since rendition of the decision in 249 Fed. 562, and encouraged thereby, numerous similar suits have been filed and are in contemplation because of the opinion of the Court of Appeals to the effect that the Land Department has been issuing patents to some in derogation of the rights of others for over fifteen years, it is impossible to doubt that there would have been serious consideration of such suggestion to advance.

But for reasons best known to counsel on the other side in Nos. 291, 292 and 495 it was deemed promotive of their expressed desire "to bring about a uniformity of decisions" to seek to have affirmed, under a motion to dismiss or affirm in No. 495, that decision of the Court of Appeals that unsettles the titles taken by many unoffending citizens of the United States in implicit

reliance upon the soundness in law of regulations and decisions of the Land Department which have obtained over a period of fifteen years.

A motion to advance Nos. 291 and 292 has been filed in this Court on behalf of the respondents in Nos. 291 and 292. And this court is hereby most respectfully urged to consider this petition for rehearing in No. 495 in conjunction with the motion to advance Nos. 291 and 292. If the petition here and such motion in Nos. 291 and 292 are granted, it is suggested in the interest of private right, in the interest of the public doing business before the Land Department and out of a wish that the rulings of the Land Department be promptly vindicated, or made to conform to law, that all three cases be argued at approximately the same time. The motion to advance sets out the results of a comparative study and analysis of the three cases.

PRIVOLOUS IN ONE RESPECT AND AS TO ALL OTHERS EVINCING A LACK OF UNDERSTANDING OF THIS COURT'S DECISIONS, WAS THE MOTION TO ADVANCE OR AFFIRM.

Petitioner begs leave to advise the Court as to the reasons he deemed sufficient for withholding an answer to the motion to dismiss or affirm.

After consultation by counsel for the petitioner with experienced practitioners in this Court concerning the motion to dismiss or affirm, and after consideration of their unanimous opinion that the stated grounds for the motion were without merit, petitioner's counsel concluded that the inevitable action this Court would take would be to overrule, postpone consideration until hearing on the merits or transfer to a summary docket.

Neither by expression nor by implication—not even by the remotest suggestion—did said motion allude to a single valid reason for a dismissal or an affirmance. Insofar as it challenged the jurisdiction of this Court it was utterly frivolous. Insofar as it urged that a decision on all the questions of law presented in the assignment of errors in No. 495 was foreclosed by frequent decisions of this Court heretofore, it but displayed a lack of understanding of the decisions of this Court. It was doubtless as much of a surprise to opposing counsel and his client as to this petitioner and his counsel that this court declared in No. 495 that there was *concurrence* between two courts below as to the *materiality* of the allegations in the bill of complaint and as to the materiality of the scant testimony given from the witness chair.

The terms of this Court's affirmance neither approve a single contention made in the motion nor contain a reference to any one of the alleged authorities cited in the motion. In these circumstances, although we concede that a Court established by the Federal Constitution undoubtedly possesses the authority and is under the obligation to dismiss or affirm (even *sua sponte*, in some cases), it would seem to us to be higher justice to the appellant and non-prejudicial to the appellee, in instances where there is apparent sincerity in the prosecution of the appeal and the incurrence of great expense by one made a defendant in a suit brought and maintained by another *in forma pauperis*, if this Court would, with respect to such motion to dismiss or affirm as was filed in this proceeding, overrule it, postpone consideration thereof until hearing on the merits, or assign the case to a summary docket.

MATERIALITY AS DETERMINED IN THE FIRST COURT OF APPEALS DECISION (249 FED. 562).

A word as to the character of the original bill. The Appellate Court observed in its first decision (249 Fed. 562, 564), that "the plaintiff is prosecuting this appeal in *forma pauperis*." * * * "The complaint is not a model of legal composition, but is an example of the difficulty to which judicial inquiry is sometimes subjected in getting at the real merits of a case, where the relevant and material facts are not fully or succinctly and plainly stated."

After rendition of the decision in 249 Fed. 562, which concluded with the statement that District Judge Bledsoe had erred (241 Fed. 931) in sustaining the motion to dismiss the original bill upon the ground that the complaint did not state a cause of action, a colorable amendment of the complaint was made, which colorable amendment caused District Judge Trippett to remark (R. 74, 267 Fed. 1004) that "the complaint has been amended but not in any material respect as compared with the complaint passed upon by the said court" (the Appellate Court, in 249 Fed. 562).

The courts below did not find, as alleged in the scurilous and libelous complaint filed by one who sued in *forma pauperis*, that officers of the Land Department and of the Department of Justice were *particeps criminis* in a conspiracy with the man sued, to take the land from the man suing and give it to the man sued. For such wholly unprovoked and numerous insults to such officers, for such purely malicious aspersions on their honor, see paragraphs II, V, XII, XIV, XV, XVII, XX, XXII, XXIII, XXVI,

XXXII, XXXIII and XXXIV of the bill of complaint at pages 2 to 10 of the Record.

The first District Court decision (241 Fed. 931) merely declared that the many lurid and loose charges of deliberate wrongdoing which the plaintiff made against public officers, were not set out in the complaint in a manner entitling the pleader to a finding that they were true and material, even under a demurrer thereto. *It must be said of the first decision that it adjudged all the allegations of the complaint to be immaterial.*

Doubtless deeming it but an act of simple justice to the thus maligned officials, District Judge Trippett said "the plaintiff offered no proof regarding the misconduct of any officers of the land department." (R. 74, 267 Fed. 1004.)

We submit that with no proof whatever offered as to the alleged venality of numerous government officials in several Departments, there could not possibly have remained in the complaint for decision thereon anything beyond what we here advisedly denominate *as the issues of pure law tendered in the XI and XXXIV paragraphs of the bill.* (R. 4 and 10.)

The first Court of Appeals decision (249 Fed. 562) is of vital importance in this discussion, *chiefly because it is the only decision in which the materiality of allegations in the complaint was actually adjudged with complete freedom of judgment thereon, and also because the land department has flatly refused to follow that decision and has exposed all its fallacies.* (*Wells v. Fisher*, 74 L. D., 288.) Such first decision was rendered notwithstanding that "no printed brief has been filed" by appellant, notwithstanding that "no specification of errors relied upon is stated, and no

citation has been issued and served upon the defendant as required by the rules of this Court," and notwithstanding that a motion to dismiss for those sundry reasons had been filed.

Such first decision does not purport to contain any finding that would require of the judiciary a holding that the cancellation of the homestead entry by the land department in the contest proceedings was procured through fraud or imposition practiced upon that department, or through corruption or bias of the officers of that department. Such decision does not purport to find any fact showing want of due process in the contest proceeding in the land department that eventuated in cancellation of the homestead entry. On the contrary, such decision remarked that "with respect to the defendants charge that the plaintiff had abandoned the entry, *we may not inquire into this as a question of fact*, although we believe it was erroneously determined, *but we may inquire into it as a question of law.*" (249 Fed. 567.) Italics supplied.

After thus acknowledging that there existed no reason for disproving the findings of fact as made by the land department in the contest proceeding, the Appellate Court, in its first opinion, *thereafter proceeded to settle the law of the case, and, therefore, to settle also the matter of materiality of allegations of the complaint.* In so doing, said court held (249 Fed. 567) that the 5th section of the act of June 27, 1906 (34 Stat. 519) rendered it legally impossible for a contest against a homestead entry of lands in a first form withdrawal under the reclamation act of June 17, 1902 (32 Stat. 388) to be initiated or maintained under a charge of abandonment. *From such holding it would follow that there was materiality in any show-*

ing that a person whose homestead entry was canceled for abandonment was, at time of abatement of the withdrawal and restoration of the land to the public domain, in occupancy of the lands that were once claimed by him under such entry.

It was also held in 249 Fed. 566, that as the "defendant in support of his contest, made oath that he did not know and had no means of knowing the facts" that, therefore, "this was insufficient to initiate a contest." *From such holding it would follow (a) that the land department had erred, for more than a generation, in enforcing regulations and decisions to the effect that an affidavit of contest may be executed on information and belief, if corroborated by another on personal knowledge, and (b) that there was materiality in any showing that in a contest proceeding in the land department the contestant admitted that he executed his affidavit on information and belief.*

It was also held in 249 Fed. 569 that "whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909" (37 L. D., 365). *From such holding it would follow that there was materiality in any showing that a person who sought to exercise a contestant's preference right subsequent to January 19, 1909, was opposed by another who was claiming the land as a settler thereon.*

It was also held in 249 Fed. 568, that to give effect to the land department's regulations of June 6, 1905 (33 L. D., 607) would be "to amend, modify, or change the act of May 14, 1880 (21 Stat. 140), under which the defendant claims his preferential right." *From such holding it would follow, of course, that there was materiality in a showing that when defendant applied*

for the land on the first day it was enterable after abatement of the withdrawal (in this case May 18, 1910), it had been settled upon by plaintiff on the first day it became subject to settlement (in this case April 18, 1910).

All the aforesaid constructions of acts of Congress and rulings on the validity of departmental decisions which the Court made in 249 Fed. 562, are emphatically repudiatory of an established practice and of a long line of decisions of the land department. However, *only one court below, and not two, exercised freedom of judgment* in construing the aforesaid acts, in condemning the aforesaid regulations and in *determining the materiality* of the allegations in the pleadings. "*The law of the case*" doctrine prevented *freedom of judgment* on those matters by the District Court, and therefore it is readily understandable that No. 495 in this Court is not a case which "as presented here turns essentially on questions of fact." Clearly evident is it that this Court was misled into believing and, in effect, expressly saying that the District Court, in the exercise of its *freedom of judgment*, had *concurred* with the Circuit Court of Appeals "that all material allegations of the bill of complaint have been substantiated."

MANY OF THE ALLEGED FINDINGS OF FACT
BELOW ARE IMPOSSIBLE AS TRUE FIND-
INGS IN THE LIGHT OF THE RECORD AND
OF THE LAW.

In our desire to convince this Court of the sincerity of our apology to it for displaying the bad judgment, but certainly not courtesy to the Court, of withholding an answer to the motion to dismiss or affirm,

we set out here every utterance of the Court of Appeals (249 Fed. 562) that might be construed as a reference by it to allegations of fact it considered as being of importance. Therein, at page 556, it is stated (because so stated in the complaint and admitted under the motion to dismiss), that "thereafter (subsequent to December 1, 1902, when the appellee here made his homestead entry) plaintiff *complied with all the requirements of the homestead and reclamation laws.*" (Italics supplied.) That statement in the complaint was contrary to the facts as found in the decision of the Register and Receiver of December 31, 1908, from which we quote the following:

"There clearly had been abandonment of the land by contestee, and there has been an utter lack of good faith shown in his relations towards his entry. *His improvements placed on the land subsequent to the date of the contest affidavit, were clearly made with knowledge of the contest.*" Italics supplied. (R. 38.)

It was contrary also to what the General Land Office found in its decision of June 25, 1909, in the contest proceeding, to-wit:

"The testimony shows beyond a question that, at the time the contest was begun, no improvements of any kind were then on the premises, that defendant had been absent for a long period, and that he had never cultivated any part of the land." (R. 40.)

And it is obviously quite the opposite of the following extract from the decision of the Secretary of the In-

terior of January 6, 1910, in the contest proceeding, to-wit:

"From his own testimony, it clearly appears that he failed to comply with the law in the matter of residence. Indeed his actual home was in another county, where he qualified as a voter by swearing that he resided there." * * * "He evidently did considerable work on the land, in cultivating, digging brush, etc.; but this work was after he had personal knowledge that the contest had been filed." Italics supplied. (R. 42 and 43.)

Further inquiring as to allegations deemed important in the exceptional decision reported in 249 Fed. 562, we notice another statement therein which was made in the complaint and admitted under the motion to dismiss, viz., that "plaintiff" * * * "made final proof", * * * "but the land department, without regard to the premises, refused to consider such proof" (249 Fed. at 565).

Such proof was made on April 23, 1909, subsequent to the decision of the Register and Receiver in the contest proceeding (R. 44). It purported to be a proof of residence and cultivation for five years, while on its face it is not such proof nor any proof answering the law's requirements. (R. 46 to 49.) Moreover, the land department did consider such proof and did reject it, it being impossible of acceptance under any law. (R. 50 to 52.)

Continuing our search for allegations deemed important in 249 Fed. 562, we notice therein, at page 566, substantially the same observation that was made in the complaint and admitted under the demurrer, to wit,

that shortly after making homestead entry on December 1, 1902, the plaintiff, although "he established his residence on the land, * * * "was not then able or prepared, *or had no occasion to believe he would be required to reside upon and cultivate the land,*" etc.) (Italics supplied.) The receiver's receipt which issued to the plaintiff under his entry on Dec. 1, 1902, expressly informed him that residence upon and cultivation of the land were required by law. (R. 32 and 33.) Furthermore the public was informed to the same effect in and by several publications of the land department, to-wit: Circular of March 31, 1904, 32 L. D., 538; paragraphs 6 and 11 thereof; Instructions of May 17, 1904, 32 L. D., 633, 634; Circular letter, 33 L. D. 38; Cornelius J. McNamara, 33 L. D., 521, 525 and Jacob Fist, 33 L. D., 257, 259.

Still pursuing allegations deemed material in 249 Fed. 562, we discover at pages 566 and 567 of the report this statement which, of course, merely reflects what was set out in the bill of complaint, to wit:

*"And at the hearing of the contest it was proven, and conceded without dispute, that plaintiff had established a residence upon the land in controversy, had made improvements thereon" * * * "that, instead of abandoning the land, plaintiff was residing on, reclaiming, cultivating, and improving it when he was served with the notice of contest."* (Italics supplied.)

No court may substitute its findings of fact for the findings of fact of the said department when made by the latter in an authorized proceeding with respect to a matter within its jurisdiction, unless in the collateral attack on the said de-

partment's findings it is shown (and it was not shown here) that those findings were the fruits of fraud or imposition practiced upon that department, or were badges of dishonor or corruption in said department. We have already quoted herein the findings of the land department in the contest proceeding and referred to the pages of the record where they may be found. Therefore this court will not fail to perceive that they are the opposite of the statements set out in the above quotation from 249 Fed. 562.

Maintaining our probe for allegations deemed important in 249 Fed. 562, we encounter, at pages 568 and 569 of the report, these statements which are *contradicted by the Record* insofar as material, to wit:

* * * "the defendant *abandoned* this claim of a preference right to enter the land, *substituted* a lieu land selection, and obtained his patent upon that claim." * * * "he *suddenly abandoned* his entry and claim of a preferential right, and presented to the land department a scrip selection for the land." (Italics supplied.)

At page 55 of the Record it is shown that the defendant did not *abandon* his preference right, but did exercise it; that he did not *substitute* anything for such right; that he did nothing *suddenly*; that he exercised his preference right of entry by filing a homestead application on May 18, 1910; that such application was suspended pending a hearing involving an official survey; that on June 1, 1912, the application was allowed and an entry made thereunder; that plaintiff contested such entry unsuccessfully during a period of approximately three years from the date of filing of application therefor; that on March 6, 1914, nearly two years

after the making of such entry, the entry was voluntarily relinquished simultaneously with the filing of papers in an appropriation of the same land under assignable soldiers' and sailors' homestead entry rights. *While the homestead entry was relinquished, the land was not abandoned, but continued uninterrupted in the same possession.* (R. 55. See also R. 59 to 64 for decision of the General Land Office sustaining the appropriation under such assignable rights).

The only other statement in 249 Fed. 562, which is suggestive of or resembles a finding as to a matter of fact is the following observation at page 570 of the report anent the protest by plaintiff against defendant's appropriation of the land under the said assignable homestead rights, to wit:

"He did not have a hearing upon his protest, although it was before the department for consideration."

But the record shows that he did have a hearing, an exhaustive, and painstaking hearing, which resulted in a six-page decision of the General Land Office in which the full history of this notable case in the land department is set out. (R., 59 to 64.)

Two very important and illuminating facts were overlooked in the *second* District Court decision as well as in the *second* Court of Appeals decision. It is nowhere noticed in either of those decisions that the relinquishment which the appellant in this Court filed on March 6, 1914, simultaneously with the filing of the said assignable homestead rights, was induced by a decision of the land department which is set out in the General Land Office decision of Decem-

ber 23, 1914, on the appellee's protest against those assignable rights. (R., 59 to 64, at 60 and 61.) Nor did it attract the notice of the appellate court that the plaintiff in the District Court, at all times after May 18, 1910, rested all his pretensions and claims in the land department upon nothing else than an application by him for *second homestead entry* which was denied (R., 71, 72 and 53). *Such application for second entry was an admission by him, if that was necessary for any purpose, that his original entry had been cancelled and had gone out of existence in accordance with due process. Never did he seek to reinstate the original entry.*

WHEREIN THE DECISIONS BELOW EVINCE
LACK OF NOTICE BY THE COURTS BELOW
OF VITAL FACTS PERTINENT TO THE SO-
CALLED LIEU LAND OR SCRIP SELECTION.

Edwards' homestead entry was canceled on Bodkin's contest on April 19, 1910 (R. 45, 56 and 49). This cancellation was the result of four concurring judgments, the first by the Register and Receiver, on December 31, 1908 (R. 37 to 39), the second by the General Land Office, on June 25, 1909 (R. 39 to 41, where the year is erroneously printed 1919), the third by the Secretary of the Interior on January 6, 1910 (R. 42, 43), and the fourth by the Secretary of the Interior, on April 19, 1910, in action on a motion for rehearing (R. 43, wherent denial of the motion is noted).

May 18, 1910, Bodkin filed application for homestead entry in exercise of his accrued and vested preference right (R. 55). This application was suspended be-

cause of an official inquiry as to a government survey. (R. 55). May 22, 1912, such suspension was revoked (R. 55). (*June 1, 1912, entry under Bodkin's application was allowed.* (R. 55.)

Edwards also, on May 18, 1910, filed an application to make homestead entry, *doing so as an applicant for the benefits of the second homestead entry legislation. He thereby, and necessarily, acknowledged the cancellation of his first entry, which had been successfully contested by Bodkin.* This Edwards application for second entry was successively rejected by the Register and Receiver, the General Land Office and the Secretary of the Interior, because of Bodkin's application in exercise of his preference right. (See *Edwards v. Bodkin*, 42 L. D., 172, for the Secretary's decision.) At pages 71 and 72 of the Record is printed the decision of the Secretary of the Interior of August 21, 1913, denying a motion for rehearing which Edwards filed in an attempt to have his second entry application sustained.

Now is presented this illuminating fact, viz., after failing to have this application for second entry sustained, Edwards, on *September 11, 1913*, filed an application to contest the entry which was allowed to Bodkin on June 1, 1912. Such application to contest was rejected by the Register and Receiver, by the General Land Office, and by the Secretary of the Interior, the latter's decision being rendered March 30, 1914. (See the General Land Office decision set out at pages 50 to 52 of the Record for the facts in that proceeding.)

More light is shed on this *cause celebre* in the Land Department from the fact that after thus twice harassing Bodkin by meritless proceedings against him in the said department, Edwards fell back on the al-

leged final proof he submitted under the entry by him which was cancelled on Bodkin's contest. On *September 3, 1914*, Edwards moved for acceptance of such *alleged* proof. (R. 49 and 50.) Rejection of such proof followed as a matter of course. (See the decision of the General Land Office of March 30, 1915, and of the Secretary of the Interior of April 6, 1915, at pages 50 to 52 and at pages 53 to 54 of the Record, respectively.)

After Bodkin relinquished his homestead entry on March 6, 1914, without abandoning possession of the land, but, on the contrary, maintaining his right to possession thereof under a location of soldiers' and sailors' rights of additional homestead entry which he located on the land simultaneously with the filing of the relinquishment of his homestead entry, Edwards, several months thereafter and subsequent to his separating himself from the land, renewed proceedings against Bodkin in the Land Department, for stated reasons set out and deemed meritless in the detailed review of the case which appears in the decision of the General Land Office at pages 59 to 64 of Record. See also the General Land Office decision at pages 50 to 52 of the Record.

No court below seems to have considered it worth while to find and state what controlled Bodkin in relinquishing his entry. His unmarried daughter, Florence Bodkin, died after becoming entitled to and making application for a homestead entry in her own right. (R. 60.) Upon her death the right under her claim passed to her father and mother. But her father was then a homestead entryman himself. The situation thus presented was the subject of the decision in *Wells v. Bodkin* (42 L. D., 340). Because of the law

as expounded in that decision, Bodkin relinquished his own homestead entry, under which he had complied with the law for approximately two years, in order to qualify himself to enjoy the right inherited from his daughter. (See pages 60 and 61 of the Record for the right of election Bodkin had to retain his own entry, or relinquish same and enter the land applied for by his deceased daughter.) At the time he relinquished, Edwards, who had not been adjudged entitled to a second homestead entry and who then had no claim to the land in the Patrick H. Bodkin entry which was countenanced by law, was not in possession of the land covered by the Patrick H. Bodkin entry and could not have been in possession thereof lawfully. *Yet the courts below, overlooking all these facts, render decisions carrying the implication that Bodkin was a speculator in the public lands and had despoiled Edwards by and through an unconscionable use of so-called lieu land scrip.*

COUNSEL'S OATH OF CONVICTION THAT THIS PETITION FOR REHEARING IS WHOLLY MERITORIOUS.

There is a duty of good citizenship that rests upon an attorney at law in this court to which reference should be made. His duty to the court is even of larger importance than his duty to his client, for the reason that in aiding this court in its study of the law in a case before it he is indirectly participating, at least believes he is, in the formulation of judicial views which will affect not only his client but the entire nation. An attorney who could be influenced only by vanity, pique, chagrin, or profit, or anything but his

conscience, to file a petition for rehearing here would be clearly unworthy the confidence of *any* court.

That this court may have a basis, other than our argument (which proceeds from one of little learning in the law and of no deserved prestige in this or any court), for regarding this petition as the work and act of one moved only by the worthiest motives, counsel has presumed to subjoin a rather unusual affidavit of merit which he hopes will receive the consideration of the court.

Respectfully submitted:

PATRICK H. LOUGHREN,
Mills Bldg., Washington, D. C.,
Counsel for the Petitioner.

AFFIDAVIT OF MERIT.

District of Columbia, ss:

Patrick H. Loughran being first duly sworn deposes and says: That for the past fourteen years he has practiced exclusively in public land cases in the Land Department and in the courts; that before entering upon such practice he was employed as an examiner of such cases in the General Land Office; that he is counsel of record in this Court for the appellant in Bodkin vs. Edwards, No. 495; that he became counsel for said Bodkin when said cause was pending in the Court of Appeals on the second appeal thereto; that he briefed the case in said court on behalf of said Bodkin; that he drafted the assignment of errors on the appeal to this Court and otherwise advised in the perfecting of said appeal; that it was he who advised against the making of answer to the motion to dismiss or affirm in this Court; that it was he who prepared the foregoing petition for rehearing.

Further deposing the affiant says: That he knows that the "law of the case" doctrine prevented the ex-

ercise of freedom of judgment on the materiality of facts by the District Court; that he knows the numerous rulings in the opinion of the Circuit Court of Appeals (249 Fed. 562) are repudiatory of statutory constructions, decisions and regulations of the Land Department that have prevailed for fifteen years; that he knows that the said Circuit Court of Appeals opinion has encouraged and induced litigation having for its objective the making of holders of titles under patents for public lands trustees of such titles for others.

Further deposing the affiant says: That with all the strength of his intellect and all the sincerity of his soul he commits himself unreservedly to the belief and conviction that the said opinion of the Court of Appeals is wholly and plainly erroneous in many respects important to promotion of the public interests; that with the very same sincerity and intensity of belief and conviction he says that the opinion of this Court of February 28, 1921, is seriously in error and that it should be, as he believes it will be, recalled, set aside and vacated after rehearing.

PATRICK H. LOUGHREN,
Counsel for the Petitioner for rehearing.

Subscribed and sworn to before me this 25th day of March, 1921.

ADELAIDE SPRECKELMYER,
Notary Public.